
OPINION OF THE PUBLIC ACCESS COUNSELOR

KRISTEN S. BROWN,
Complainant,

v.

COLUMBUS POLICE DEPARTMENT,
Respondent.

Formal Complaint No.
18-FC-18

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Columbus Police Department (“CPD”) violated the Access to Public Records Act¹ (“APRA”). Attorney Scott Chinn filed an answer on behalf of the CPD. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 30, 2018.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Kristen S. Brown (“Brown”) filed a formal complaint alleging the Columbus Police Department (“CPD”) violated the Access to Public Records Act (“APRA”) by improperly denying her access to public records. Specifically, Brown alleges the CPD did not have discretion under APRA’s *investigatory records* exception to withhold the records she requested.

On January 23, 2018, Brown filed a public records request with the CPD requesting photographs related to an incident that happened on August 23, 2016, involving two Bartholomew County employees and resulted in damage to a vehicle owned by the county and issued as a take-home vehicle to an employee of the sheriff’s department. Brown requested the photographs of the damaged vehicle taken by a CPD officer at the scene.

CPD issued a letter—dated January 24, 2018—acknowledging receipt of Brown’s request along with a contemporaneous denial. In its denial, the CPD asserted that the photos were investigatory records and it would not release them in accordance with Indiana Code section 5-14-3-4(b)(1).

As a result, Brown filed the instant complaint against CPD on January 30, 2018. Brown contends that CPD’s denial of her request for the photographs is a violation of APRA for the following reasons: (1) The requested photos are not investigatory records because they were taken while securing the incident scene and not as part of an investigation; (2) Even if the officer’s actions at the scene are considered part of an investigation, the surrounding circumstances do not warrant invocation of the investigatory records exception because there is no threat to public safety, an expectation of

privacy, or an ongoing investigation; and (3) CPD's invocation of the investigatory records exception in this case is arbitrary, capricious, and an abuse of discretion.

This Office notified CPD of the complaint on February 2, 2018. CPD requested and received an extension of time to file an answer. The department, by and through counsel, filed its answer on March 12, 2018.

The CPD disputes Brown's claim that an APRA violation has occurred in this case. CPD asserts that its denial of the request comports with the Act because: (1) The photographs are investigatory records for purposes of APRA; (2) The circumstances of the incident warrant invocation of the investigatory records exception; and (3) Withholding the photos from disclosure was not arbitrary, capricious, or an abuse of discretion.

ANALYSIS

This case presents a specific question about whether the Columbus Police Department had discretion under the Access to Public Records Act to withhold the photographs Brown requested from public disclosure as investigatory records.

1. The Access to Public Records Act ("APRA")

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide

the information.” *Id.* There is no dispute that the Columbus Police Department (“CPD”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6).

Therefore, unless otherwise provided by statute, any person may inspect and copy the CPD’s public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, the Act contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a).

In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

1.1 Investigatory Records

Under APRA, the term *investigatory record* means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). Ind. Code § 5-14-3-8(b)(1) allows an agency to withhold or disclose investigatory records at the discretion of the law enforcement agency. This discretion is not absolute. Ind. Code § 5-14-3-9(g)(2) establishes a cause of action for abuse of discretion as arbitrary and capricious. That determination is not for this Office, but ultimately for the courts. That said, it is my statutory obligation to provide guidance and advice to public agencies and the public on how to avoid that and similar pitfalls.

Based upon the information provided, the Complainant raises a presumption that the decision to withhold materials could possibly be construed as an abuse of discretion. The question is whether these materials would (a) be released to another requester; or (b) be released if it the incident had not involved another officer of the law. If the answer to either of these questions is “yes,” then the CPD would ostensibly need to rebut that presumption. Given that the requester is a current litigant in another matter and accident photos have been released in other similar circumstances not involving law enforcement personnel, the CPD has not provided a compelling reason as to why this incident rises to the level of heightened sensitivity.

The photos, while taken by a CPD officer, were also not used in the investigation of a crime conducted by CPD. It is my understanding the Bartholomew County Sheriff’s Department and/or the Indiana State Police investigated the incident. It is unclear whether CPD is exercising the discretion to withhold the photos on the behalf of one or both of those entities. If the photos were available from them, for example, it erodes CPD’s argument that withholding was justified.

This Office has often stated that the investigatory records exception is broad, perhaps overly so. To that end, we have often provided law enforcement agencies the following parameters to ensure justified use of the discretion. These parameters, developed with other law enforcement agencies, have been generally well-received. So much so that the legislation concerning access to body-worn camera footage mirror them: would the release of the record compromise an ongoing or open investigation; would the release jeopardize a reasonable expectation of privacy; or would disclosure of

investigatory material create a public safety risk. The CPD has not invoked any of these considerations and has only cited to a broad interpretation and application of Ind. Code § 5-14-3-4(b)(1).

The baseline for any public records request is disclosure with exceptions being carved out therefrom. The purpose of public access is accountability, arguably even more so for law enforcement. Therefore it stands to reason that when literally self-policing one of their own, an agency should err on the side of transparency, to the extent possible, to ensure that accountability. While able to withhold the accident photos by the letter of the law, it does not appear as if the CPD withholding in consistency with its spirit.

RECOMMENDATION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Columbus Police Department should release the requested photos.

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor